



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 2, 2005

Mr. Kevin B. Laughlin  
Atkins & Peacock, L.L.P.  
P.O. Box 111  
Odessa, Texas 79760

OR2005-03755

Dear Mr. Laughlin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 223151.

The Ector County Independent School District (the "district"), which you represent, received a request for information related to a former district employee. You state you have released some information but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

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<sup>1</sup> We note that the submitted documents have been bates stamped pages 1 through 57.

Gov't Code § 552.022(a)(1). The submitted information is a completed sexual harassment investigation made by the district. The submitted information is expressly public under section 552.022(a)(1), and must therefore be released unless the information is expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the district may not withhold the submitted investigation under section 552.103. However, because sections 552.101, 552.114, and 552.135 of the Government Code are considered "other law" for the purposes of section 552.022, we will address your claims under these exceptions for the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses the doctrine of common law privacy. In order for information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

The submitted information contains an adequate summary of the sexual harassment investigation at issue. In accordance with the holding in *Ellen*, the district must release the summary and the statement of the accused. However, identifying information of the victims and witnesses to the alleged sexual harassment are protected by the doctrine of common law privacy and must be withheld from these documents. We note that you have also identified other submitted documents you will disclose that are related to the investigation at issue. Identifying information of victims and witnesses to the alleged sexual harassment must be

withheld from this information as well. Some of the records marked for release contain information relating to the requestor's child that would be excepted from disclosure to the general public in order to protect the child's privacy pursuant to the holding in *Ellen*. However, as a parent of the child, the requestor has a special right of access to this information. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). We note that the district has bates stamped the summary, statement of the accused, and these other related documents as pages 1 through 13. We have marked the identifying information in pages 1 through 13 that must be withheld pursuant to section 552.101 in conjunction with common law privacy.

We note that these documents, pages 1 through 13, also contain the address and social security number of the former employee. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold the former employee's address and social security number if he made a timely election to keep such information confidential.

If section 552.117 does not apply, the former employee's social security number may nevertheless be confidential under federal law. Section 552.101 of the Government Code also excepts from disclosure information considered to be confidential by statute. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the district should ensure that such information is not obtained or maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We note that, because the district will release an adequate summary of its investigation, the remaining submitted documents, bates stamped as pages 14 through 57, are generally confidential under section 552.101 in conjunction with common law privacy. However, pages 14 through 57 identify district students and are thus "education records" for purposes of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other

than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A) (granting parents affirmative right of access to their child's education records). The state laws you raise in your arguments cannot abrogate that right. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Consequently, to comply with FERPA, the district must provide the requestor with access to those portions of the responsive documents that directly pertain to her child. *See* Open Records Decision No. 152 (1977) (educational institution must provide copy of education record to qualified individuals). However, we note that FERPA grants a special right of access to parents only in regards to their own children. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). Therefore, the district may not allow the requestor access to those portions of the responsive documents that pertain to other district students. The remaining portions of the submitted documents must be withheld under section 552.101 of the Government Code in conjunction with common law privacy.

To conclude, the summary of the sexual harassment investigation, the statement of the accused, and the related documents contained in pages 1 through 13 must be released with the exception of the identifying information we have marked. Further, pursuant to section 552.117 of the Government Code, the district must withhold the former employee's address and social security number in these thirteen documents if he made a timely election to keep such information confidential. The district is advised that the former employee's social security number may be confidential under federal law. Pursuant to FERPA, the district must provide the requestor with access to those portions of pages 14 through 57 that directly pertain to her child. The remaining submitted information must be withheld under section 552.101 of the Government Code in conjunction with common law privacy.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/jev

Ref: ID# 223151

Enc. Submitted documents